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No. 73

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

ROBERT NEWTON GARDNER, JR.

v.

THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI

SUPPLEMENTAL MEMORANDUM ON BEHALF OF PETITIONER

CHARLES E. RICKERSHAUSER, JR.
606 South Hill Street
Eleventh Floor
Los Angeles, California

Attorney for Petitioner

This memorandum has been prepared in response to the request of Mr. Justice Fortas for a report concerning how many of the States have habeas corpus procedures which do not provide for review, in a traditional appellate manner, of denials of relief by trial courts. Because of the shortness of time available, research has been restricted to an attempt to ascertain the extent to which the states permit direct appeal from a final judgment adverse to the petitioner in the trial of a habeas corpus action arising out of a criminal case. It should also be noted that due to the complexity of the indexing systems and the myriad potential sources of the various state rules, it is possible that some discrepancy may exist between the authorities reported herein and the applicable practices of the states.

In general, investigation has revealed the following breakdown. Thirty-six states provide for review by direct appeal. Five states (Arkansas, Louisiana, Missouri, North Carolina and North Dakota) permit review by certiorari or supervisory writ. Colorado provides for review by writ of error. An unsuccessful attempt has been made to discover whether this is a writ of right under Colorado law. Seven states (California, Maryland, Montana, Oklahoma, Rhode Island, Vermont and Wyoming) expressly prohibit appeal. Hawaii appears to restrict original jurisdiction to issue the writ to the Supreme Court, so the question of appealability does not arise in that state.

A more detailed discussion of the various state procedures follows.

At the appellate level, habeas corpus procedures are by no means uniform throughout the United States. Both statutory and decisional law have been examined in each jurisdiction. It is appropriate to note certain factors at the outset, as they have some bearing on the treatment of the writ by the legislatures and the courts of the different states.

Habeas corpus derives from the common law and was classically regarded as a writ of right. Perhaps for this reason the constitution of every state, following the United States Constitution, provides that the writ shall not be suspended except (in some states) in cases of invasion or rebellion. It also appears that under the common law there was no right of appeal from a judgment in a habeas corpus proceeding except such as might be granted by constitution or by statute. Thus there is a presumption of nonappealability underlying the courts' interpretation of the statutory material.

The majority of the states view habeas corpus as a civil proceeding. Some regard it as an extraordinary proceeding available only in a limited class of situations. Some regard it as a criminal proceeding. The traditional, more widespread view is that it is a civil action. Since the writ is available in civil custody cases (usually involving detention of minor children) as well as to convicted prisoners, the law of a number of jurisdictions has drawn a distinction between these two types of cases and has adopted its rule as to the availability of appeal accordingly. A further distinction is drawn by statute between the right of the state and the right of the individual to appeal from an adverse judgment. In this memorandum such distinctions are noted when they have appeared

significant, and an attempt has been made throughout to cite to decisions in habeas corpus cases arising out of criminal proceedings.

It should also be noted that at least eleven states (Delaware, Florida, Illinois, Kentucky, Maryland, Missouri, Montana, Pennsylvania, Vermont, West Virginia and Wyoming) have adopted specific post-conviction legislation providing for review and correction of sentences on motion to a court of general jurisdiction. In some states this legislation has supplanted traditional habeas corpus relief; in some states it merely supplements it. An attempt has been made herein to ascertain the effect of such legislation in the various states.

Alabama

A right of appeal is provided by statute. Ala. Code tit. 15, §369(a) (1940) grants the right "to any party aggrieved by the judgment on the trial of a habeas corpus". The Alabama Supreme Court has held that this section applies to state prisoners. Banks v. State, 275 Ala. 504, 156 So.2d 364 (S.Ct. 1963), Price v. Holman, 279 Ala. 324, 184 So.2d 835 (S.Ct. 1966).

Alaska

By statute, a right of appeal is granted to "a party to a proceeding by habeas corpus" from a final judgment denying the writ. Alaska Code Crim. Proc. §12.75.230 (1962). Appeal to the Supreme Court is a matter of right, and that court also has concurrent original jurisdiction with the superior courts to issue the writ. Alaska Judiciary Code §§22.05.010, 22.10.020 (1962). No reported decisions have been found interpreting or applying these sections to habeas corpus proceedings involving state pirsoners.

Arizona

In Arizona, a petitioner in a habeas corpus proceeding may appeal from an order or judgment refusing his discharge. Ariz. Rev. Stat. §12-2101 L.1 (1955). The provision was originally enacted in 1913. Habeas corpus is treated as a civil proceeding, and no distinction is made between habeas corpus actions arising out of criminal or civil proceedings, for the purpose of appeal. Application of Anderson, 6 Ariz. App. 563, 435 P.2d 70 (1967). The Supreme Court and the superior courts have concurrent jursidiction to issue the writ. Ariz. Rev. Stat. §13-2003 (1955).

Arkansas

Under Arkansas law there is no express statutory right of appeal from a judgment in a habeas corpus proceeding. It appears from the decisions that for many years the only available means of obtaining appellate review of any such judgment was by petition for a writ of certiorari. This rule obtained both in cases arising out of criminal proceedings and in those involving custody of minor children. See, e.g., Ex parte Jackson, 45 Ark. 158 (S.Ct. 1885), Ex parte Holdaway, 105 Ark. 1, 150 SW123 (S.Ct. 1912), Johnston v. Lowery, 181 Ark. 284, 25 SW2d 436 (S.Ct. 1930). In 1955 the Arkansas Supreme Court held that appellate review of habeas corpus proceedings in child custody cases had become a matter of right in the state and henceforth would be governed by the statute pertaining to appeals. The court specifically confined its ruling to child custody cases however. Fulks v. Walker, 224 Ark. 639, 275 SW2d 873 (S.Ct. 1955). No decisions have been found in which the court ruled on the applicability of Fulks v. Walker to habeas corpus petitions by

state prisoners. On this basis it is concluded that no right of direct appeal exists in such cases.

California

The statutory provisions for appeals in habeas corpus cases involving a criminal defendant are set forth in Cal. Penal Code §1506 (1927). The section grants the right of appeal to the people "from a final order of a superior court ... discharging a defendant in a criminal case." Cal. Penal Code §1507 (1959 as amended 1967) permits appeal from an order of a superior court in non-criminal cases to "any person other than a defendant in a criminal case." Under the provisions of Cal. Penal Code §1475, a "prisoner" may petition either the appropriate superior court, the court of appeals or the supreme court, all of which have concurrent original jurisdiction to issue the writ.

The California courts have uniformly ruled that §1506 operates to defeat a state prisoner's attempts directly to appeal from an order of a superior court denying his petition for habeas corpus. People v. Lempia, 144 Cal.App.2d 393, 301 P.2d 40 (1956), cert. den. 353 U.S. 916 (1956), People v. Dowding, 185 Cal. App.2d. 274, 8 Cal. Rptr. 208 (1960), People v. Griggs, 67 Cal.2d 314, 61 Cal. Rptr. 641, 431 P.2d 225 (S.Ct. 1967).

Colorado

In Colorado, habeas corpus actions are held to be civil in nature and judgment therein is reviewable by writ of error. People ex rel. Metzger v. District Court, 121 Colo. 141, 215 P.2d 327 (S.Ct. 1949), Barrett v. People, 136 Colo. 144, 315 P.2d 192 (S.Ct. 1957). By statute, the only method for review by the supreme court of a lower court judgment is by writ of error.

Colo. Rev. Stat. 37-2-26 (1963). There appear to be no intermediate appellate courts in the state.

Connecticut

Conn. Gen. Stat. Ann. §52-470 (as amended 1967) provides:

> "The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments therein, and inquire fully into the cause of imprisonment, and shall thereupon dispose of the case as law and justice require. No appeal from the judgment rendered in a habeas corpus proceeding brought in order to obtain his re-release by or in behalf of one who has been convicted of crime shall be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or a justice of the supreme court to certify that a question is involved in the decision which ought to be reviewed by the supreme court and the judge so certifies."

No cases have been found construing this section.

Delaware

The Delaware constitution confers appellate jurisdiction on the supreme court to receive appeals from the superior court in civil and criminal causes. Del. Const. Art. 4, §11 (1897, as amended 1960). The superior court has jurisdiction to issue the writ of habeas corpus. 10 Del. Code Ann. §6901 (1953). In addition, the superior court has authority to correct an illegal sentence at any time, on motion by the prisoner, and may reduce a sentence under certain circumstances. 13 Del. Code Ann. Superior Ct. Rules, Crim. Rule 35 (1953, as amended 1960). The Delaware Supreme Court has ruled that a prisoner seeking habeas corpus relief in the superior court must first exhaust the remedies available under Rule 35. Curran v. Woolley, 48 Del. (9 Terry) 382, 104 A.2d 771 (S.Ct. 1954).

In 1959 a provision that an indigent prisoner shall be furnished a free copy of the transcript of the testimony in an appeal from the denial of a petition for habeas corpus was adopted by the state supreme court. 13 Del. Code Ann. S.Ct. Rule 10A (1959).

Florida

In Florida "any party or persons aggrieved" by a judgment in a habeas corpus proceeding appears to have a right of appeal. The right was conferred by Fla. Stat. Ann. §79.11 (1822, repealed 1967). The state constitution provides appeals from final orders of trial courts to either circuit courts or the supreme court as a matter of right. Fla. Const. Art. 5 §5(3) (1885, as amended 1960). In 1964 the state supreme court held that §79.11 was fully superseded by the above amendment to the constitution and by the Florida Appellate Rules and, in dicta, recommended that the section be repealed. State ex rel Callahan v. Michell, Fla. 170 So2d. 291 (S.Ct. 1964).

In addition, Rule 1.800 of the Florida Rules of Criminal Procedure provide for the correction or reduction of an illegal sentence. Under Florida law, habeas corpus is viewed as a civil proceeding. State ex rel Lee v. Buchanan, Fla. 191 So2d. 33 (S.Ct. 1966).

Georgia

In Georgia appeals in habeas corpus cases are provided by statute, and such appeals are governed by the Appellate Procedure Act of 1965. Georgia Code Ann. §50-126 (1933), §50-127(11)(1967). Under that statute, final judgments and rulings of trial courts

are appealable to the court of appeals and then to the supreme court. Georgia Code Ann. §6-701 (1965), Georgia Const., Code Ann. §2-3704 (1945), Ramirez v. State, 223 Ga. 815, 158 S.E.2d 235 (S.Ct. 1967).

Hawaii

Under Hawaii law, at present, it appears that no court save the supreme court has jurisdiction to issue a writ of habeas corpus, as the state legislature has not yet enacted any specific legislation with respect to the writ. The supreme court's authority derives from the state constitution. Hawaii Const. Art. 5, §§1 and 6 (1959). Only one reported case has been found where the Supreme Court ruled on an original petition for the writ, In re Habeas Corpus Balucan, 44 Haw. 271, 353 P.2d 631 (S.Ct. 1960).

Idaho

In Idaho, the writ may be granted either by the supreme court or the district courts. Idaho Code 19-4203 (1947). Appeals may be taken to the supreme court from a final judgment of a district court. Idaho Code 13-201 (1947). The state supreme court has held that a district court order denying the release of a prisoner on petition for habeas corpus is appealable. Application of Haney, 77 Idaho 166, 289 P.2d 945 (S.Ct. 1955).

Illinois

Prior to 1962 a denial of a petition was not reviewable in Illinois. A 1962 amendment to the state constitution now confers both original and appellate jurisdiction in cases of habeas corpus on the supreme court, and appeals from final judgments of circuit

courts lie directly to the supreme court as a matter of right. Ill. Const. Art. 6,§5 (1962). This amendment has been held to apply to the quashing of a writ petitioned by a state prisoner. People ex rel Pauling v. Misevic, 32 Ill.2d. 11, 203 N.E.2d 393. (S.Ct. 1964), cert. denied 380 U.S. 963 (1965).

Under the Post-Conviction Hearing Act of 1951, a prisoner may petition the sentencing court for the correction of his sentence on grounds of infringement of his constitutional rights, and any final judgment entered upon such petition may be reviewed by the supreme court as an appeal in civil cases. Ill. Ann. Stat. Ch. 38 §§122-1, 122-7 (as amended 1963).

Indiana

Indiana provides that appeals may be taken directly to the supreme court both from final judgments and interlocutory orders in habeas corpus cases. Ind. Stat. Ann. §4-214 Fifth and Fourteenth (1963), Houtchens v. Lane, 246 Ind. 542, 5 Ind. Dec. 241, 206 N.E.2d 131 (S.Ct. 1965).

Iowa

In Iowa appeals are provided from final judgments to the supreme court, and "any party aggrieved by an interlocutory ruling or decision" may apply to the supreme court to grant an appeal in advance of final judgment. Iowa Code Ann., Rules of Civil Procedure, Rule 331 and 332 (1945). The state supreme court has ruled that an order refusing to issue a writ of habeas corpus is a final appealable order. Alberts v. Lainson, 250 Iowa 748, 94 N.W.2d 94 (S.Ct. 1959).

Kansas

Kansas provides appeal as a matter of right to the supreme court from an order that grants or refuses to grant relief in the form of habeas corpus. Kan. Stat. Ann. 60-2102 (a)(2) (1963). Interpreting the former version of this statute, the state supreme court held that a state prisoner may appeal as a matter of right from a district court judgment discharging the writ. Andrews v. Hand, 190 Kan. 109, 372 P.2d 559 (S.Ct. 1962), cert. denied 371 U.S. 880 (1962).

Kentucky

Kentucky provides that any party to a hearing on a writ of habeas corpus may appeal the judgment to the Court of Appeals. Ken. Rev. Stat. §419.13(1) (1962). The Court of Appeals is the supreme court of Kentucky. Ken. Const. §109 (1891). The state also provides a post-conviction remedy for correction or reduction of sentence. Rules Crim. Proc. 11.42 (1962). The Court of Appeals has held that this remedy must be exhausted before habeas corpus is available to a detained prisoner. Ayres v. Davis, Ky. 377 S.W.2d 154, 878 (S.Ct. 1964), cert. denied 379 U.S. 848 (1964).

Louisiana

The Louisiana Supreme Court has general supervisory jurisdiction over all inferior courts but the right of direct appeal thereto is restricted to a limited class of cases. La. Const. Art. 7, §10 (1921, as amended 1958). The court has held that it is without authority to review on appeal the judgment of a trial court in a habeas corpus proceeding in a criminal case. State v. Ames, 249 La. 685, 190 S.O.2d 223 (S.Ct. 1966), State ex rel. McIsaac v. Sigler, 236 La. 773, 109 S.O.2d 89 (S.Ct. 1959).

The constitution grants only limited civil jurisdiction to the courts of appeal, La. Const. Art. 7, §29 (1921, as amended 1958). Habeas corpus in cases arising out of criminal confinement is viewed as a criminal matter. Under this view the Louisiana rule appears to be that the intermediate appellate courts lack appellate, supervisory and original jurisdiction over petitions for habeas corpus arising out of commitment because of criminal proceedings. State ex. rel. Jones v. Sheriff of Calcasieu Parrish, La., 185 So.2d 80 (Ct. App. 1966).

Maine

14 Me. Rev. Stat. Ann. §5508 (1963) provides for appeal for a final judgment in criminal habeas corpus trials by both the petitioner and the state to the Supreme Judicial Court "in the same mode and scope of review as any civil action". Rules 75(a)&(d) of the Maine Rules of Civil Procedure (as amended 1962 and 1964) have been held to apply to an appeal by a criminal petitioner in such a case. Beaulieu v. State, 161 Me. 248, 211 A.2d 290 (S.Ct. 1965)

Maryland

The statutory provisions for appeal in habeas corpus proceedings were amended in 1958 by the Post-Conviction Procedure Act, Md. Ann. Code Art. 27, §245A (1958, as amended 1962, 1965, 1966). That section specifically applies only to the right of appeal of convicted persons. It has been held by the Court of Appeals of the state [the highest court] that the Post-Conviction Procedure Act abolished the right of appeal from an adverse decision in a post-conviction habeas corpus proceeding. State v. Musgrove, 241 Md. 521, 217 A.2d 247 (S.Ct. 1966), Cumberland v. Warden of Maryland Penitentiary, 225 Md. 636, 171 A.2d 709 (S.Ct. 1961)

cert. denied 369 U.S. 855 (1962). However, under Md. Ann. Code Art. 41 §25 (1951, as amended 1963), an accused person has the right to apply for a writ of habeas corpus and denial of an application in extradition cases only is appealable to the Court of Appeals.

Massachusetts

Mass. Gen. Laws Ann. Ch. 231, §96 (1820) provides that "any party aggrieved . . by any order decisive of the case" has a right of appeal to the Supreme Judicial Court. That court has held this language applicable to an appeal by a state prisoner from a trial court's denial of his petition for habeas corpus relief. Stearns, Petitioner, 343 Mass. 53, 175 N.E.2d 470 (S.Ct. 1961), Needel, Petitioner, 344 Mass. 260, 172 N.E.2d 125 (S.Ct. 1962), Maki v. Superintendant of Mass. Correctional Institution, 349 Mass. 519, 209 N.E.2d 185 (S.Ct. 1965).

Michigan

The law in Michigan on the question of appealability is uncertain. Under the General Court Rules of 1963, Mich. Stat. Ann. (1964), Rule 806.2(4) provided appeal by leave to the supreme court. Rule 806 was amended extensively in 1965 and 1966, and the specific provision re habeas corpus proceedings was excluded from the language of the statute. As it now stands enacted, Rule 806.1 grants an appeal as of right "in all criminal and civil matters" to a party aggreived by a final judgment. Rule 806.1, Mich. Stat. Ann. (1964, as amended 1966). The preliminary committee comment on special rules pertaining to the Extraordinary Writs Rules 710-718, General Court Rules of 1963, Mich. Stat. Ann. (1964) specifically calls attention to the

rules' treatment of habeas corpus as an extraordinary legal remedy which "cannot be made to fit into the pattern of ordinary civil actions." Accordingly, by statute, Michigan distinguishes the procedure for habeas corpus in cases of prisoners and in child custody cases. However, the Michigan Supreme Court has ruled that habeas corpus is a civil proceeding, under the authority of a 1948 statute, People v. McCager, 367 Mich. 116, 116 N.W.2d 205 (S.Ct. 1962). Although no cases under have been found specifically ruling on the effect of the 1966 amendment to Rule 806.1, it is concluded that there is a right of direct appeal in Michigan.

Minnesota

Under Minnesota law an order discharging a criminal defendant's application for a writ of habeas corpus is appealable to the supreme court. Minn. Stat. Ann. §589.29 (1941), State v. Collins, 270 Minn. 581, 131 N.W.2d 802 (S.Ct. 1964).

Mississippi

Miss. Code Ann. §1177 (1942) provides a right of appeal from a judgment on the trial of a writ of habeas corpus for a criminal petitioner. Perciful v. Holley, Sheriff, 217 Miss. 203, 63 So.2d 817 (S.Ct. 1953).

Missouri

In Missouri there is no right of direct appeal from a judgment in habeas corpus cases but it is reviewable by the supreme court, courts of appeal and circuit courts by writ of certiorari. Ark. Const. Art. 5, §4 (1945), State ex rel Stewart v. Blair, 357 Mo. 287, 208 S.W.2d 268 (S.Ct. 1948). Denial of

post-conviction relief is appealable, however, under Ann. Mo. Stat. Crim. Rules 27.26 and 28.03 (1953), State v. Cory, Mo. 408 S.W.2d 11 (S.Ct. 1966).

Montana

A Post-Conviction Hearing Act of 1967 provides a right of appeal to the state from a judgment discharging a petitioner on habeas corpus. Mont. Code Crim. Proc. 95-2714 (1967). Under prior law, an appeal did not lie from an order denying habeas corpus in a criminal case, although it did lie in a civil [child custody] case. State v. Booth, 134 Mon. 235, 328 P.2d 1104 (S.Ct. 1958). On this basis it is concluded that the 1967 statute repeals the prior law only in the case of an appeal by the state.

Nebraska

In Nebraska the denial by a trial court of a prisoner's petition is reviewable by appeal to the court of appeals and to the supreme court. Neb. Const. Art. 1 §24 (1875), Neb. Rev. Stat. §29-2823 (1929), Tail v. Olson, 144 Neb. 820, 14 N.W.2d 840 (S.Ct. 1944), Rhodes v. Houston, 172 Neb. 177, 108 N.W.2d 807 (S.Ct. 1961).

Nevada

In Nevada, the right of appeal is granted by statute, and appeal from a final order denying the writ may be taken to the supreme court. Nev. Rev. Stat. 34.380 (1953). This provision has been held to preclude an additional application for an original writ of habeas corpus to a justice of the supreme court where no new grounds are asserted and the petitioner has not availed himself of the right of appeal. Ex parte Merton, 80 Nev. 435, 395 P.2d 766 (S.Ct. 1964).

New Hampshire

In New Hampshire, application may be made for habeas corpus to the superior court. N.H. Rev. Stat. Ann. 534:3 (1955). The supreme court also has jurisdiction to issue the writ, together with its general supervisory jurisdiction over inferior courts. N.H. Rev. Stat. Ann. 490:4 (1955). No appeal is expressly provided by statute in habeas corpus cases. N.H. Rev. Stat. Ann. 490:10 (1955) provides:

> "Any party aggrieved by ... the judgment of the superior court ... may allege exceptions thereto ... which ... shall be allowed by the presiding justice and be entered in the supreme court for determination."

While no case has been found directly ruling out the question of appealability, it appears that review is available to the supreme court for corrections of errors of law. Springer v. Hungerford, 100 N.H. 503, 130 A.2d 538 (S.Ct. 1957), State v. Murray, 104 N.H. 38, 178 A.2d 507 (S.Ct. 1962).

New Jersey

In New Jersey, jurisdiction to issue writs of habeas corpus is in the superior courts, their judges, and each county judge. N.J. Stat. Ann. 2A:67-15 (1951). A prisoner may appeal a final decision to the appellate division of the superior court. N.J. Stat. Ann. 2A:67-36 (1951). Appeals from a decision of the appellate division of the superior court may be taken to the supreme court on certification, as provided by law. N.J. Const. Art. 6, §5 ¶1 (1947). It has been held that the state has an absolute right of appeal from a judgment discharging a criminal petitioner. State v. Rivas, 16 N.J. Super. 159, 85 A.2d 16 (1951), State v. Daniels, 38 N.J. 242, 183 A.2d 648 (S.Ct. 1962), cert. denied 374 U.S. 837 (1962).

New Mexico

Under New Mexico law, both the supreme court and the district courts have concurrent original jurisdiction to issue writs of habeas corpus. N.M. Const. Art. VI, §§3 and 13 (1911). The supreme court rules appear to allow an appeal to "any party aggrieved" in all civil actions, and specifically provide for appeal by the state in habeas corpus proceedings, and that procedure on appeals in criminal cases is the same as procedure in civil cases. N.M. Stat. Ann. 21-2-1(5) (1929 as amended 1953). The New Mexico courts appear to view habeas corpus as a civil proceeding. Roehm v. Woodruff, 64 N.M. 278, 327 P.2d 339 (S.Ct. 1958), Johnson v. Cox, 72 N.M. 55, 380 P.2d 199 (1963).

New York

Under New York law an appeal may be taken from a final judgment refusing to grant a writ of habeas corpus. CPLR §7011, Con. Laws N.Y. (1963), People v. Gersewitz, 294 N.Y. 163, 61 N.E.2d 427 (S.Ct. 1945), cert. denied 326 U.S. 687 (1945), People ex rel Tatra v. McNeill, 19 App. Div.2d 845, 244 N.Y.S.2d 500 (S.Ct. 1963).

North Carolina

North Carolina law distinguishes, for purposes of appeal, between habeas corpus in criminal cases and child custody cases. Every court of record has authority to issue the writ in both classes of cases. N.C. Gen. Stat. §17-41 (1869). Either party may appeal to the supreme court from a final judgment in child custody cases, but there is no appeal from a judgment in any other class of cases. N.C. Gen. Stat. §17-40 (1859), State v. Renfrow, 247 N.C. 55, 100 S.E.2d 315 (S.Ct. 1957). Review of the

an order denying habeas corpus in criminal cases is by certiorari and rests in the sound discretion of the court. In re Palmer, 265 N.C. 485, 144 S.E.2d 413 (S.Ct. 1965).

North Dakota

Both the supreme court and the district courts have jurisdiction to issue the writ. N.Dak. Const. §§87, 103 (1889). North Dakota makes a distinction between habeas corpus in child custody and in criminal cases, and a final judgment in the former class of cases is one affecting substantial rights and is appealable. Raymond v. Geving, 74 N.D. 142, 20 N.W.2d 335 (S.Ct. 1945). There is no appeal from a final order discharging or remanding a prisoner in habeas corpus proceedings. Carruth v. Taylor, 8 N.D. 166, 77 N.W. 617 (S.Ct. 1898), State ex rel Bismarck v. Dist. Ct., 64 N.D. 399, 253 N.W. 744 (S.Ct. 1934). Such an order can only be reviewed by supervisory writ. State ex rel Bismarck v. Dist. Ct., supra, State ex rel Johnson v. Broderick, 75 N.D. 340, 27 N.W.2d 849 (S.Ct. 1947).

Ohio

Ohio provides that a proceeding upon a writ of habeas corpus may be reviewed on appeal as in other cases. Ohio Rev. Code 2725.26 (1953). It has been held that this statute authorizes appeal from an order denying a writ in a criminal case. Ex parte Karnes, 67 Abs. 455, 121 N.E.2d 159 (App.Ct. 1953).

Oklahoma

Any court of record has original jurisdiction to issue the writ. 12 Okl. Stat. §1333 (1910). No right of direct appeal is provided by statute. The Oklahoma courts have ruled that the supreme court has jurisdiction on appeal to review an order of

the district court in a habeas corpus proceeding involving custody of a minor child, but that no appeal lies from an order in a proceeding brought by a party "imprisoned or restrined of his liberty". Ex parte Johnson, 1 Okla Cr. 414, 98 P.461 (Cr. App. 1908), Sedtke v. Kukuk, 93 Okl. 264, 220 P.615 (S.Ct. 1923), Ex parte Kincaid, 194 Okl. 356, 151 P.2d 796 (S.Ct. 1944), Ex parte Houston, 93 Okl. Cr. 26, 274 P.2d 281 (Cr. App. 1950).

Oregon

A right of appeal is provided by statute to any party to a proceeding by habeas corpus, including the state. Ore. Rev. Stat. §34.710 (1953). Under Oregon law, appeal in habeas corpus cases was not available at common law, but a right of appeal has been granted by the above statute: State v. Endsley, 214 Ore. 537, 331 P.2d 338 (S.Ct. 1958).

Pennsylvania

The statutory provision for appeal by prisoners under sentence from an adverse decision in a habeas corpus proceeding formerly contained in 12 Penna. Stat. Ann. §1907 (1951) have been repealed by the Post-Conviction Hearing Act of 1966, 19 Penna. Stat. Ann. §1180-11 (1966), and appeals by prisoners under sentence are now governed by that statute. It appears, however, that the supreme court continues to grant direct appeal to a criminal defendant from an adverse judgment in habeas corpus. Com. ex rel Kress v. Rundle, 425 Pa. 142, 228 A.2d 772 (S.Ct. 1967).

Rhode Island

Under Rhode Island law, the superior courts have concurrent jurfsdiction with the supreme court to issue the writ of habeas corpus. R.I. Gen Laws §10-9-30 (1905). By statute, appeal from

a superior court judgment is expressly barred. R.I. Gen Laws §10-9-22 (1905). The state supreme court has held that, in view of the statutory scheme granting concurrent original jurisdiction to the superior court, that court's decision denying a prisoner's petition is neither appealable directly nor be means of a petition for certiorari. Lee v. Gough, 84 R.I. 358, 124 A.2d 549 (S.Ct. 1956).

South Carolina

Concurrent jurisdiction to issue the writ is given to the supreme court, the court of common pleas and general sessions, and any two magistrates by statute. So. Car. Code of Laws §§15-121, 17-354 (1932). Appeals from all final decisions rendered on applications for the writ are allowed as in civil actions. So. Car. Code of Laws §17-363 (1932). The statutes have been interpreted as granting a right of appeal both to the state and to prisoners. Douglas v. Hall, 229 S.C. 550, 93 S.E.2d 891 (S.Ct. 1956), Welch v. Mac Dougall, 246 S.C. 258, 143 S.E.2d 455 (S.Ct. 1965).

South Dakota

Concurrent original jurisdiction to issue the writ is given by statute to the supreme court and the circuit courts. S. Dak. Code §37.5503 (1939). The supreme court has appellate jurisdiction to hear appeals from the circuit courts from "any final order affecting a substantial right, made in special proceedings." S.Dak. Code §33.0701 (1939). A circuit court order dismissing a state prisoner's petition is appealable to the supreme court under that section. Ex parte Watt, 73 S.Dak. 436, 44 N.W.2d 119 (S.Ct. 1950).

Tennessee

Ten. Code Ann. §23-1836 (1887) provides:

> "Any party, either relator or defendant, in any habeas corpus case shall have the right of appeal to the proper appellate court from any judgment or decree rendered against such party by an inferior court; provided, that the party so appealing shall give bond and security for the costs of such appeal; and provided, that this section shall not apply to parties held in custody in criminal cases.

It has been held that "in custody in a criminal case" means in a pending case, and that a prisoner held in custody after conviction does not fall within the meaning of the phrase. State ex rel Guy v. Foster, 160 Tenn. 285, 23 S.W.2d 660, 24 S.W.2d 897 (S.Ct. 1930). The petitioner's right of appeal is conditioned on his giving bond; there is no right of appeal on a pauper's oath and an appeal may be dismissed when no bond is filed. State ex rel Strong v. Strong, 175 Ten. 291, 133 S.W.2d 996 (S.Ct. 1939), State ex rel Britt v. Burns, 192 Tenn. 514, 241 S.W.2d 551 (S.Ct. 1951).

Texas

By statute, the Court of Criminal Appeals [the highest court of record in criminal cases], the district courts, the county courts and their judges have concurrent jurisdiction to issue the writ in criminal cases. Tex. Stat. Ann. Code Crim. Proc. Art. 11.05 (1965), Tex. Const. Art. 5 §5(1876, as amended 1891). The defendant [prisoner] may appeal from a judgment rendered on the hearing of an application by an inferior court, and the judgment of the Court of Criminal Appeals in such appeals is final and conclusive. Code Crim. Proc. Arts. 44.34, 44.38 (1965).

Under Texas law, an order refusing to grant a writ of habeas corpus must be a judgment rendered after a hearing in order to be

appealable under the above statutes; the granting of a motion to dismiss an application is not such a judgment and appellate jurisdiction exists only after a hearing on the merits of the case. Nichols v. State, 158 Tex. Cr. 367, 255 S.W.2d 522 (Cr. App. 1953), Ex parte Eidinoff, Tex. Cr., 408 S.W.2d 540 (Cr. App. 1966).

Utah

By constitution and statute the supreme court has concurrent jurisdiction with the district courts to issue the writ. Utah Const. Art. VIII, §§4 and 8 (1895), Utah Code Ann. §78-2-2, 78-3-4 (1943). The supreme court has appellate jurisdiction to review all final judgments of the district courts. Utah Code Ann. §78-2-2 (1943). Rule 72 of the Rules of Civil Procedure authorizes appeals to the supreme court from all final judgments of the district courts in accordance with Utah Const. Art. VIII, §9 (1895).

An early case, applying essentially similar statutory language, held that an appeal from an order of the district court discharging a person from arrest upon a writ of habeas corpus does not lie to the supreme court, in that it is not a final judgment. Mead v. Metcalf, 7 Utah 103, 25 P. 729 (S.Ct. 1891). This case was overruled in Weimovich v. Emery, 33 Utah 345, 93 P.988 (S.Ct. 1908). In that case the court held that habeas corpus is a special statutory civil proceeding in Utah, that the right of appeal from a final judgment of a district court is a constitutional right, and that in a habeas corpus proceeding the judgment of the court which either remands or discharges the petitioner is a final judgment, notwithstanding the fact that another similar proceeding may be commenced by the petitioner if he elects to do so. This holding appears to have been consistently followed by the Utah courts. Young v. Ellett, 106 Ut. 140, 146 P.2d 196 (S.Ct. 1944).

Vermont

Concurrent original jurisdiction to grant the writ is in the supreme court, a judge of the superior court and the county courts. 12 Vt. Stat. Ann §3953 (1947). It appears that no right of appeal is expressly afforded by statute, and the state supreme court has held that the state has no right to appeal an order discharing a prisoner in a habeas corpus action. In re Fitts, 124 Vt. 146, 197 A.2d 808 (S.Ct. 1964). Under the court's reasoning in that case, it would appear that absent an express statutory provision for an appeal by a petitioner, such an appeal would not be held to be available under the general statutes governing appeals in civil and criminal cases, as the court viewed habeas corpus as an extraordinary right or remedy and held that proceedings thereunder are governed by special statutes.

However, a new section dealing with post-conviction remedies was adopted by the legislature in 1966. A prisoner in custody may move the county court to vacate, set aside or correct his sentence and an appeal may be taken to the supreme court from the order entered on the motion. 13 Vt. Stat. Ann. §§7131, 7135 (1966).

Virginia

The supreme court of appeals had concurrent jurisdiction with the circuit courts and corporation courts to issue the writ, and has appellate jurisdiction over habeas corpus proceedings as well. Va. Const. §88 (1902, as amended 1928), Va. Code §§17-97, 8-596 (1919, as amended 1968), Smyth v. Godwin, 188 Va. 753, 51 S.E.2d 230 (S.Ct. 1949), cert. denied 333 U.S. 946 (1949). Under Va Code §8-607 (1919), a petitioner remanded

to custody after the hearing of his petition may apply for a writ of error, under the general statute governing appeals in civil cases. Va. Code §8-462 (1919), Smyth v. Godwin, supra. The term "appeal" includes the term "writ of error". Va. Code Rules of Court, Rule 5:1 §2 (1957).

Washington

In Washington, the supreme court has concurrent jurisdiction to grant the writ together with the superior court. Wash. Const. Art. 4 §§4,6 (1889, as amended 1952), Wash. Rev. Code 7.36.040 (1881), 2.04.010 (1890). The supreme court also has appellate jurisdiction in all actions and proceedings. Wash. Rev. Code 2.04.010 (1890). No case has been found directly ruling on the question of the appealability of a denial of a prisoner's petition for habeas corpus. However, since several sections of the habeas corpus statute provide for procedures "whether in an original proceeding or upon an appeal" (See Wash Rev. Code §§7.36.140, 7.36.250 (1947)) and since cases have been found dealing with the substantive questions involved in habeas corpus proceedings in lower court actions (See e.g., Thorne v. Callahan, 39 Wn.2d 43, 234, P.2d 517 (S.Ct. 1951), In re Pettit v. Rhay, 62 Wn.2d 515, 383 P.2d 889 (S.Ct. 1963)) it is concluded that there is a right of direct appeal in the state.

West Virginia

The supreme court of appeals has both original and appellate jurisdiction in cases of habeas corpus. W.Va. Const. Art. 8, §3 (1872), W. Va. Code §51-1-3 (1931). The Post-Conviction Habeas Corpus Act of 1967 provides for appeal of a final judgment by both the petitioner and the state to the circuit court and thence to the supreme court of appeals. W.Va. Code §53-4A-9 (1967), Pozzie v. Prather, W.Va., 157 S.E.2d 625 (S.Ct. 1967).

Wisconsin

The supreme court, the circuit courts and county courts have concurrent jurisdiction to issue the writ. Wis. Const. Art. 7, §§ 3 and 8 (1848), Wis. Stat. Ann. 292.01 (1849). Wis. Stat. Ann. 274.05 (1898, as amended 1949) provides that the supreme court shall issue writs of error, under certain circumstances, to review an order or judgment of any court discharging or remanding a person, except in the case of a prisoner committed for trial. This section has been held to apply in such cases over the more general language of 274.33, permitting appeal to the supreme court from a final order affecting a substantial right made in a special proceeding. (Wis. Stat. Ann. 274.33 (1860)). Wolke v. Fleming, 24 Wis.2d 606, 129 N.W.2d 841 (S.Ct. 1964), cert. denied 380 U.S. 912 (1964). It should be noted that in Wisconsin a writ of error is a writ of right. Wis. Const. Art. 1, §21 (1848).

Wyoming

The supreme court and the district courts have concurrent jurisdiction to allow the writ. Wyo. Stat. §1-811 (1869, as amended 1945). The Code of Civil Procedure provides for successive application by the petitioner. Wyo. Stat. §1-810 (1869 as amended 1945). It has been consistently held that a decision in a habeas corpus proceeding is not appealable, as the petitioner may avail himself of successive writs before other courts. Brugreax v. Dankowski, 51 Wyo. 103, 63 P.2d 800 (S.Ct. 1936), Briggs v. Wilcox, Wyo., 404 P.2d 752 (S.Ct. 1965).

Wyoming provides a post-conviction procedure whereby a prisoner may petition for review by the sentencing court of the proceedings which resulted in his conviction, on constitutional questions only. Appeals from final judgments may be taken directly to the supreme court. Wyo. Stat. §§7-408.1, 7-408.7 (1961).

Respectfully submitted,

CHARLES E. RICKERSHAUSER, JR.
Attorney for Petitioner

I, Charles E. Rickershauser, Jr., counsel for Robert Burton Gardner, Jr., petitioner, certify that on the 5th day of December, 1968, I served a copy of the Supplemental Memorandum on Behalf of Petitioner on the Attorney General of the State of California by placing a copy of the same in the United States Mail, first-class postage prepaid, addressed as follows:

Hon. Thomas C. Lynch
Attorney General of the
State of California
600 State Building
Los Angeles, California 90012
Attn: Jack W. Sober, Esq.
Deputy Attorney General

CERTIFICATE OF SERVICE

I, Charles E. Rickershauser, Jr., counsel for Robert Newton Gardner, Jr., petitioner, certify that on the 5th day of December, 1968, I served a copy of the Supplemental Memorandum on Behalf of Petitioner on the Attorney General of the State of California by placing a copy of the same in the United States Mail, first-class postage prepaid, addressed as follows:

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Charles E. Rickershauser, Jr.